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No. 88-737

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JEAN ELIZABETH MORGAN,
Petitioner,

v.

ERIC A. FORETICH,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

SUPPLEMENTAL BRIEF

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December 30, 1988

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As noted in the petition for certiorari, *see* Petition at 13 n.18, Dr. Morgan filed a habeas corpus petition in the Superior Court of the District of Columbia on September 22, 1988, alleging that her continued incarceration for civil contempt has become punitive, and that due process therefore requires that she be released. Since the filing of the petition for certiorari, Judge Dixon has taken several actions disposing of the habeas petition. In a written order entered on November 9, 1988, Judge Dixon ordered the proceedings on the habeas petition merged and consolidated into the underlying domestic relations

proceedings, and ordered further that the petition would thereafter be treated as a motion for relief from order of civil contempt with Dr. Foretich and the guardian *ad litem* being given full opportunity to opine on the constitutionality of Dr. Morgan's continued confinement. In a written order entered on December 20, Judge Dixon denied the motion for relief from order of civil contempt, rejecting Dr. Morgan's contention that due process required her immediate release. On December 29, Dr. Morgan filed a Notice of Appeal and a Motion for Expedited Appeal from Judge Dixon's denial of her motion.

Dr. Morgan has now been incarcerated for over sixteen months for civil contempt. The fact of Dr. Morgan's incarceration and certain other aspects of her case have continued to attract considerable media attention, *see, e.g.*, Lewis, *Judgment of Solomon*, N.Y. Times, Dec. 15, 1988, at A39, *reprinted in* Appendix, underscoring the increasing public awareness of child sexual abuse cases, *see* Petition at 14-18; *cf. Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988) (O'Connor, J., concurring) (noting that "[c]hild abuse is a problem of disturbing proportions in today's society"). However, Judge Dixon's closure order has prevented the public from learning the evidence supporting Dr. Morgan's defense to civil contempt—evidence that Hilary has been sexually abused by Dr. Foretich—and from learning how Judge Dixon has sifted that evidence. As a consequence, the closure order has frustrated the public's ability to assess intelligently the judicial response to this case. *See* Lewis, *supra* (complaining that Judge Dixon's reasons for excluding certain evidence of sexual abuse, "like so much else" about this case, are sealed).

Respectfully submitted,

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APPENDIX

APPENDIX

ABROAD AT HOME—Anthony Lewis

JUDGMENT OF SOLOMON

WASHINGTON—Dr. Elizabeth Morgan is a leading plastic surgeon in Washington. Or was. For the last 16 months she has been a prisoner in the District of Columbia jail.

Dr. Morgan has not been convicted of any crime. She is in jail for civil contempt of a court order that she turn her daughter, Hilary, now 6, over to her ex-husband for unsupervised visits.

She refused to obey that order, and refuses, because she has reason to believe that her ex-husband sexually assaulted their child. In August 1987, rather than comply, Dr. Morgan sent Hilary away to a person and place unknown.

That is a bare introduction to a case of extraordinary dimensions, legal and human. At a hearing in the District of Columbia Superior Court, I found myself disturbed as I seldom have been by a legal proceeding.

Dr. Morgan took the witness stand. Her lawyer, Stephen Sachs, the former Attorney General of Maryland, asked her to describe her present circumstances. She said she shared a small cell, 6 feet by 11, with another prisoner.

"You conduct all of daily living in public," she said, with showers and toilet open to view. "There is rock music 16 hours a day. It is a depressing, confining, zoo-like existence."

But she has adjusted to it, Dr. Morgan said. And life was actually much easier "with my daughter safe."

"She begged me to hide her, so her father could not find her. . . . She understood that it might be for a short time, and it might be until she grew up."

Her ex-husband, Eric Foretich, a dental surgeon, was in court. As Dr. Morgan testified, he occasionally made circles with his forefinger at his head to suggest that she was crazy. His lawyer, John Lenahan, cross-examined.

"Where is Hilary?"

"I am not going to answer that question." But "she is healthy, she is happy and she is healing from the abuse inflicted on her by her father."

"Do you consider yourself absolutely infallible?"

"No. But in this case I've heard from my daughter, and from others, explicit descriptions of sexual acts that I'm not allowed to describe."

Judge Herbert B. Dixon has sealed much of the evidence and forbidden the parties to disclose it. But quite a bit is known.

A father is accused of child abuse.

Hilary showed traumatic signs after weekend visits with Dr. Foretich. She was examined by doctors and others. Their opinions divided, but a number believed there had been sexual abuse. A specialist in child sexual abuse, Dr. Charles Shubin, found vaginal scarring.

A particularly compelling set of facts concerned Hilary's half-sister, Heather. Dr. Morgan was Dr. Foretich's third wife. Heather, now 8, was a child of the second marriage.

Heather said she did not want to visit Dr. Foretich. In 1986 Dr. Foretich took her to a psychiatrist to try to

find out why. She told the psychiatrist that Dr. Foretich had "hurt me down there."

Judge Dixon would not hear evidence about Heather. His reasons, like so much else, are sealed.

In a collateral case, in Federal Court in Virginia, the evidence on Heather was also excluded. But the U.S. Court of Appeals for the Fourth Circuit said it should have been admitted. The panel, which included retired Supreme Court Justice Lewis F. Powell, said that "given the similarity of the injuries," evidence about Heather would have made Dr. Foretich's defenses "quite implausible."

Dr. Foretich has denied any impropriety. Judge Dixon found the evidence on sexual abuse "in equipoise." He then ordered Hilary to spend two weeks with Dr. Foretich. Her flight followed.

The latest hearing sought Dr. Morgan's release on the ground that she plainly could not be coerced into producing Hilary. Her fiancé, Judge Paul R. Michel of the U.S. Court of Appeals for the Federal Circuit, said she was prepared to stay in jail another 12 years if necessary—until Hilary is 18 and safe.

Judge Michel said he had counseled Dr. Morgan to obey the court and had actually taken Hilary to her father twice for weekend visits. He said: "There's nothing I've ever done in my life that I regret more than those two actions."

To disobey a court order is a grave thing in a system as dependent on law as ours is. But it is very hard to understand the way the law has been applied in this case.

Suppose the evidence, partially heard, was "in equipoise" on sexual abuse. Even that made unsupervised visits too grave a risk to what must be the dominant concern in such a case: the best interest of the child.